

Final

**The Byrd Amendment Is WTO-Illegal:
But We must Kill the Byrd with the Right Stone**

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1. The Appellate Body Ruling

On 16 January 2003, the WTO Appellate Body issued its report on *United States – Continued Dumping And Subsidy Offset Act Of 2000* (WTO Doc. WT/DS217 and 234/AB/R). In this report, the Appellate Body condemned the so-called US *Byrd Amendment* by finding that it was inconsistent with the US obligations under the WTO Agreements on Antidumping (AD) and Subsidies and Countervailing Measures (SCM).

The *Byrd Amendment* is a US legislation whereby the federal state promises to distribute proceeds from (eventually imposed) antidumping and countervailing duties to all US economic operators supporting a domestic petition to impose such duties. Such a petition by the private sector is a necessary procedural prerequisite under the WTO AD and SCM Agreements for the United States to lawfully initiate an investigation, which might lead to the eventual imposition of duties.

The Appellate Body condemned the *Byrd Amendment* for essentially a formal reason: as it states in § 265 of its report, the US legislation at hand is an offset payment which is not a definitive antidumping duty, a provisional measure or a price undertaking. Since only these three forms of duties are permissible as specific action against dumping under the WTO AD Agreement, the Appellate Body concluded that the United States violated its obligations under the WTO by introducing a measure to counteract dumping other than the three permissible forms to do so.

By the same token, when used against subsidies, the *Byrd Amendment* is a form of counteracting subsidies other than those permitted under the WTO SCM Agreement. Hence, the violation of the WTO contract in this respect as well.

In what follows, we explain why, in our view, although the end-result of the Appellate Body process might be to our liking, we disagree with the path used by the WTO adjudicating body to construct its legal reasoning that ultimately led to a finding of violation. In our view, there is a substantive reason why the *Byrd Amendment* violates the WTO contract. The United States, by imposing antidumping (and/or countervailing duties) and at the same time, transferring funds to (allegedly) injured (through dumping or subsidies) US economic operators, in fact goes beyond what is prescribed as the positivist objective function of antidumping / countervailing duties, which is to re-instate a "level playing field" disturbed through dumping or subsidies. In other words, by over-compensating (allegedly) injured private parties, the United States turns the tables and disturbs the "level playing field", this time to the advantage of its nationals.

In order to avoid any misunderstandings, we should make it clear that in this paper we take the AD and SCM Agreements as an exogenous legal constraint, imposed by the existing agreements. We do not necessarily accept, indeed we have reservations about, the rationale underlying these agreements.

2 How The Byrd Was Hit

The Appellate Body found that the *Byrd Amendment* is inconsistent with Art. 18.1 AD (and 32.1SCM) because it is a specific action against dumping (and subsidy) other than those permitted by the AD and SCM Agreements. Art. 18.1 AD reads in pertinent form:

"No specific action against dumping or exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

Art. 32.1 SCM contains the equivalent provision in the context of subsidies.

Formally, the Byrd Amendment is not an antidumping duty (definitive or provisional) or a price undertaking. Hence, formally, Art. 18.1 (and for the same reason, Art. 32.1 SCM) are violated.

Earlier, however, the Panel, in its report, had gone a bit further. The Panel report, *inter alia*, found against the *Byrd Amendment* because in its view, it

"has a specific adverse impact on the competitive relationship between domestic products and dumped [or subsidized] products" (WTO Doc. WT/DS217 and 234/R of 16 September 2002 at § 7.39).

The Panel unfortunately did not elaborate on this point. More specifically, the Panel did not explain at all how precisely the *Byrd Amendment* adversely impacted on the competitive relationship between domestic and foreign products. As we elaborate in Section 4, the key or essential distortion introduced by the Byrd Amendment into the "competitive relationship" arises in the precise sense that the Amendment implies that the assessed dumping (subsidy)

margin will be exceeded by the counteracting tariff when the Byrd subsidy is added to it. But, while the Panel may have had an intuitive inkling of this argument, there is no evidence whatsoever in its brief and all-too-nontransparent remark that we reproduced above that it got to the exact nature of the problem. At any rate, as shown in what immediately follows, this point was overturned by the Appellate Body.

The Appellate Body first reproduced this passage from the Panel's report on the *Byrd Amendment* (the official name of which is CDSOA) in the following terms:

"The Panel found that the CDSOA is a measure against dumping or a subsidy because it "has a specific adverse impact on the competitive relationship between domestic products and dumped [or subsidized] imports". (Panel Report, para. 7.39) According to the Panel, the CDSOA is against dumping or a subsidy because it affects competition between, on the one hand, dumped or subsidized products, and, on the other hand, domestic products, to the detriment of the imported products." (footnote 194 of the report, *op. cit.*).

The Appellate Body then dismissed the Panel's approach in this respect in the following terms:

"We note that the United States challenges what it views as the Panel's incorporation of a "conditions of competition test" in Article 18.1 of the *Anti-Dumping Agreement* and in Article 32.1 of the *SCM Agreement*. In our view, in order to determine whether the CDSOA is "against" dumping or subsidization, it was not necessary, nor relevant, for the Panel to examine the conditions of competition under which domestic products and dumped/subsidized imports compete, and to assess the impact of the measure on the competitive relationship between them. An analysis of the term "against", in our view, is more appropriately centred on the design and structure of the measure; such an analysis does not mandate an economic assessment of the implications of the measure on the conditions of competition under which domestic product and dumped/subsidized imports compete." (§ 257 of the report, *op. cit.*, italics in the original, underlining added).

This passage reflects the heart of our disagreement with the approach privileged by the Appellate Body. Contrary to the Appellate Body's assertion, we believe that it is quite relevant for the adjudicating body to look into the effects of the measure in order to reach an informed judgment on what is wrong with the *Byrd Amendment* (and here we agree with the Panel's intuition). The Appellate Body limited its judicial review in the letter of the AD (and SCM) Agreements without paying any attention to the context (in the sense of Art. 31 of the Vienna Convention on the Law of Treaties) of the particular legal provisions it was called to interpret.

Words however, are not invariances. They are context-dependent. The appropriate way to understand what is wrong with the *Byrd Amendment*, we believe, is to view the term "specific action against dumping" figuring in Art. 18.1 AD (and specific action against subsidies figuring in Art. 32.1 SCM) in their context. It is the legal context that will enable us to understand the objective function of the instrument (be it the AD or the SCM Agreement).

3 The Wider Picture

What does the term specific action against (dumping or subsidy) amount to when viewed in the context of the AD (or the SCM) Agreement?

The context of the Agreement, legally speaking, is (at least) the rest of the Agreement. The most important provision to understand the function of the AD Agreement is Art. 3.1 AD (Art. 5 and Art. 15.1 SCM). There it is clearly stated that WTO Members are allowed to counteract dumping (or subsidies) provided that they can demonstrate that their domestic industry producing the like (to the dumped / subsidized) product has suffered injury as a result of dumping (subsidy). The AD and SCM Agreements may therefore be construed as making a

distinction between an injury to competitors and an injury to competition standard, with violation of the former being construed as the key test of whether the defendant has violated its WTO obligation.

But this is an artificial distinction: if competition is affected, so will competitors in general, and the only question is whether the deleterious effect on competitors (the plaintiffs) is large enough to warrant action. Thus, the proper way to interpret Art. 3.1 AD (Art.5 and Art.15.1 SCM), and the entire Agreement on the subject at hand, seems to us rather to imply a two-step procedure. First, that the AD margin (or subsidy) be determined by agreed procedure; and second, that this margin be counteracted, up to but not exceeding the margin so determined, provided that injury is established. In short, the margin to be determined implies an upper cap to the distortion of competition by the defendant; but that, as a matter of what might loosely be called “proportionality”, the determination of a positive margin is a necessary, not a sufficient, condition for the counteracting imposition of duties. Between the two of them, we have a necessary and sufficient set of conditions for counteracting imposition of duties.

Can we justify this two-step interpretation? Yes, indeed. Take the first step. Two points may be made. First, traditionally, in AD (and subsidy) actions, tremendous effort is undertaken by plaintiffs to increase the size of the determined margin whereas the defendants work equally assiduously to reduce it. If the margin was not the key and crucial determinant of the counteracting duties that would be legitimated (subject to the injury test, of course), why bother to spend so much time and effort on it? In fact, for centrally planned economies, the name of the game always has been to use every dirty but acceptable trick in the book to arrive at the margins that would justify and trigger corresponding counteracting duties! Surely, this is also the reason why the founding fathers of the AD Agreement spent so much time and effort trying to

establish the methods to be used in order to establish the precise dumping margin. So, the notion that the margin is somehow not the Prince in Hamlet is faintly ridiculous.

Next, it is equally compelling to argue that, not merely traditional practice, but also the Agreements in question, imply that the margin provides an upper cap, a ceiling, to the amount of counteracting duties. Both Art. 9.1 AD (and Art. 19.2 SCM) reflect the so-called “lesser duty rule”: WTO members can impose counteracting duties that are less than the determined margin, if they decide that a full countervail will produce enough relief for the plaintiff firms. Nowhere does the Agreement say, however, that this determined margin can be exceeded if that is required, in the judgment of the country whose firms are the plaintiffs, to bring relief.

Now, the Agreement also makes a nod in the direction of interests other than competition. Thus, it states that the effects of dumping on competition might or might not be taken into account. The AD contains an optional (best endeavours) “public interest clause” (Art. 6.2 AD) and so does the SCM Agreement (Art. 12.2 SCM): WTO Members do not have to, but may look into other (probably beneficial) effects of dumping on consumer welfare (either final consumer or, in case the dumped item is an input to a final product, on producer welfare when such producers *use* the particular “dumped” input in their process of production). As stated however, WTO Members do not have to look into such effects; to impose AD duties, they are obliged to look into the effects of dumping on producer welfare, i.e. on competitors, only.

Consequently, it is reasonable to conclude that, both “customary practice” and the Agreements on AD and SCM in force today imply that AD duties (and CVDs as well) are meant to re-establish a “level playing field” between domestic and foreign competitors, by allowing affected WTO Members to impose import duties that can go up to, but not beyond, the

determined margin of dumping (or subsidy), thereby raising the prices of imported “dumped” (or subsidised) goods up to the level where they should have been had no dumping ever occurred.

4 Byrd Amendment Tops the Margin

It follows therefore that the fundamental WTO-illegality of the *Byrd Amendment* consists in violating the rule, justified by Agreement (and ensuing practice), that the determined margin cannot be exceeded. The way the *Byrd Amendment* does this is by allowing the proceeds from the counteracting import duties to be redirected to the petitioning firms. But that means that, on top of the duties which have countervailed the determined margin, the firms also get the revenue proceeds as a subsidy!

One might argue that this is not a necessary outcome if the “lesser duty” option is taken and the counteracting duty invoked is below the determined margin. But this does not really let the *Byrd Amendment* off the hook. Why? Because, while the EU has sometimes used the “lesser duty” option, the US Government does not. In fact, under US law, the Department of Commerce has no such discretion. The duty margin found is the duty margin assessed. So, the *Byrd Amendment* unmistakably, and unambiguously, exceeds the cap provided by the determined margin. That makes it WTO-illegal if our contention about the illegality of exceeding the margin is accepted.

5 The Feenstra-Bhagwati Alternative

But it is possible to amend the *Byrd Amendment* so that it is both WTO-legal and a superior alternative, in economic terms, to the current practice and Agreements. Writing in 1982,

I and my student, now a most distinguished trade theorist, Robert Feenstra proposed what we called an “Efficient Tariff” where the revenue proceeds from the tariff imposed because of successful lobbying would be used to bribe the same lobby into a lower duty, while keeping the same level of support (from the lower duty plus the tariff revenues granted as a subsidy).¹ The lobby would be as well off as with the higher tariff; but the economy would be better off because a tariff implies, whereas a production subsidy does not, a gratuitous cost to consumers: a lesson which is at the heart of the revolution in the post-war theory of commercial policy starting in the 1960s.²

Evidently, if we were to replace the WTO-illegal Byrd Amendment which uses the subsidy from the tariff proceeds to exceed the cap, with the Feenstra-Bhagwati Amendment which says: use a “lesser duty” but then use the tariff proceeds to give a subsidy, choosing the lower duty such that the sum of the lower duty and the tariff proceeds adds up to the support allowed by the cap as determined by the margin established, then that would indeed be an improvement.

So, we are not against the use of revenue proceeds to reward the plaintiff firms, as such. If such a subsidy is used in the Feenstra-Bhagwati fashion, retaining the overall support at the determined margin, then that is certainly a step in the right direction. The *Byrd Amendment* is a step backwards; Feenstra-Bhagwati would be, in principle at least, a step forward, from the existing practice and Agreement which relies on the use of tariffs alone.

¹ Cf. Robert Feenstra and Jagdish Bhagwati, “Tariff Seeking and the Efficient Tariff”, in J.Bhagwati (ed.), Import Competition and Response, Chicago: Chicago University Press, Chapter 9, 1982, pp. 245-258.

6 Further Observations from the Economics of the Issue

But two concluding observations are in order, concerning the Agreement itself:

(1) That the dumping margin is determined in ways that are both arbitrary and often make little economic sense is well-known. But even if it was accurately determined without any legal and economic shenanigans, there is no reason to think that we could sustain the proposition that, if countervailed, this action would result in a restoration of competition prior to dumping (or subsidy). More precisely, consider the following proposition:

Calculate the dumping margin, as observed, as the difference between price charged at home and the (lower) price charged in the complainant country, and then impose an import duty matching the margin. Then, the configuration of prices, imports, production and consumption in two equilibria, one in absence of dumping (i.e. assuming that the defendant firms price as if under perfect competition) and one after countervail of the observed dumping margin, will be equivalent.

It is immediately obvious that this “equivalence” proposition will not hold generally under conditions of imperfect competition, which in fact are the only case where dumping can occur in the sense of differential prices in two markets, just as Bhagwati (1965) showed that the equivalence of tariffs and quotas did not hold under imperfect competition either.³

(2) In contrast, subsidies can be available to both perfectly and imperfectly competitive industries. A margin, calculated as the subsidy being given, is an appropriate measure of the counteracting import duty if the defendant firms are operating under perfect competition. Such a

² This was the key contribution of J.Bhagwati and V.K.Ramaswami, “Domestic Distortions, Tariffs and the Theory of Optimum Subsidy”, Journal of Political Economy, February 1963, pp. 44-50. Also see J.Bhagwati, Free Trade Today, Princeton: Princeton University Press, 2002.

³ J.Bhagwati, “On the Equivalence of Tariffs and Quotas”, in the Haberler Festschrift (1965), Amsterdam:North Holland; reprinted as Chapter 12 in Bhagwati’s collected essays, edited by Robert Feenstra, The Theory of Commercial Policy, Cambridge: MIT Press, 1983.

countervail will indeed restore competition fully. But this does not apply, as with AD countervails where competition is necessarily (*sine qua non*) imperfect, to cases where the subsidy is being given to imperfectly competing firms.

We may then well ask: is not the traditional focus of customary practice and existing Agreements on the dumping margin (and subsidy) not misplaced, and based on faulty economic reasoning? If the objective is to reproduce the equilibrium that would exist under perfect competition, even an honestly estimated margin is not really appropriate. There is probably no short-cut like that which is satisfactory. Sophisticated economic analysis, just as we have gotten used to in the case of anti-trust actions which address a set of competition-related issues, seems to be indispensable,.